

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER  
ADMINISTRATIVE REVIEW AND FINAL AGENCY ORDER VACATING THE  
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

United States of America, Complainant, v. Shine Auto Service, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100180.

**Vacation by the Chief Administrative Hearing Officer of the  
Administrative Law Judge's Order Denying Default Judgment**

The Honorable E. Milton Frosburg, the Administrative Law Judge assigned to this case by the Chief Administrative Hearing Officer, issued an Order Denying Default on June 16, 1989. The Complainant, on June 27, 1989, filed a request for review with the Chief Administrative Hearing Officer in the above-styled proceeding.

Pursuant to Title 8, United States Code, Section 1324(e)(6) and 28 C.F.R. 68.52, (hereinafter the Rules) the Chief Administrative Hearing Officer, upon review of the Administrative Law Judge's Order and in accordance with the controlling section of the Immigration Reform and Control Act of 1986, (hereinafter IRCA) supra, vacates the Administrative Law Judge's Order.

On April 7, 1989, the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter the INS) filed a complaint with the Office of the Chief Administrative Hearing Officer against the Respondent, Shine Auto Service. The INS charged Shine Auto Service with violations of IRCA. The INS alleged three violations of the provisions of Title 8, United States Code, Section 1324a, one violation for knowingly hiring or in the alternative, continuing to employ an unauthorized alien and two violations for failure to prepare the employment eligibility verification form.

On April 24, 1989, Respondent received the Notice of Hearing via certified mail. Respondent failed to file an answer to the complaint within the time period prescribed by the Rules. Section 68.6(a) provides:

Within thirty (30) days after the service of a complaint, each respondent shall file an answer.

Section 68.5(d)(2) provides:

Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.

These two rules, in conjunction, allow the Respondent a total of thirty-five days to file an answer. Respondent was served with the Notice of Hearing on April 24, 1989. In order to calculate when the answer was due in this proceeding, one must count off thirty-five days beginning with the day after Respondent was served and include all weekends and holidays. If correctly calculated, one shall arrive at a due date of May 29, 1989. Here, the Administrative Law Judge received Respondent's answer on June 14, 1989, sixteen days beyond the due date.

Section 68.6(b) of the Rules explicitly addresses this circumstance. It provides in part:

Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his/her right to appear and contest the allegations of the complaint.

Once aware of Respondent's delinquent status as to filing an answer, the INS filed a Motion for Entry of Default Judgment, which was received by the Administrative Law Judge on June 12, 1989. In his Order Denying Default Judgment, the Administrative Law Judge acknowledged that it is his usual practice to issue an Order to Show Cause Why Default Should Not Issue. However, in the instant case, the Administrative Law Judge did not follow his usual practice. Instead, the Administrative Law Judge denied the Motion for Entry of Default Judgment and issued an Order Directing Procedures for Pre-Hearing.

In his Order, the Administrative Law Judge described the answer he received from Respondent on June 14, 1989, as timely, even though it was due on May 29, 1989. Respondent's answer was nothing more than a general denial. Notwithstanding its tardiness in filing, Respondent failed to request permission to file a late answer, it proffered no good cause for being late with its answer, nor did it raise any defense as to the reason it was late.

In light of the above stated facts, the Administrative Law Judge shall, in his discretion, choose how to proceed. He shall, upon receipt of a Motion for Default Judgment, in which no timely answer has been filed by the Respondent, grant Complainant's motion or issue an Order to Show Cause Why Default Should Not Issue. If the Administrative Law Judge chooses the latter, then the Re-

spondent must justify its failure to respond in a timely manner. Based on the Respondent's reply, the Administrative Law Judge shall determine whether the respondent has met the threshold for good cause. If the Administrative Law Judge determines that the Respondent possessed the requisite good cause for failing to file a timely answer, then the Administrative Law Judge may allow the Respondent to file a late answer.

Here, it appears that the Administrative Law Judge acted in disregard of the time limitation set forth in 28 C.F.R. 68.6(a). It is of the utmost importance that the regulations are uniformly applied. If standards are provided in the regulations and a party acts in conformance with those standards, it is only fair that the Administrative Law Judge also adhere to those standards. It is recognized that each Administrative Law Judge may use discretion when issuing decisions; however, even that discretion is governed by the regulations.

For the above stated reasons, I hereby vacate the Administrative Law Judge's Order Denying Default Judgment of June 16, 1989, pursuant to 8 U.S.C. 1324a(e)(6).

**SO ORDERED:**

Dated July 14, 1989.

RONALD J. VINCOLI  
Acting Chief Administrative Hearing Officer

Vacated by CAHO (7/14/89)

**UNITED STATES DEPARTMENT OF JUSTICE  
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United States of America, Complainant, v. Shine Auto Service,  
Respondent; 8 U.S.C. 1324a Proceeding, Case No. 89100180.

ORDER DENYING DEFAULT JUDGMENT

Complainant, United States of America, filed a Complaint against Shine Auto Body, Respondent, on April 7, 1989. On April 17, 1989, a Notice of Hearing was sent by the Office of Chief Administrative Hearing Officer, assigning me as the Administrative Law Judge to this case and setting the date and place of hearing as August 1, 1989, in Salt Lake City, Utah. As of June 11, 1989, the Complaint was not answered.

On June 12, 1989, I received a Motion for Entry of Default Judgment from Cathy A. Auble, Attorney for Complainant, on the grounds that Respondent had failed to file an Answer to the Complaint. By usual practice, an Order to Show Cause Why Default Should Not Issue is issued by this office after receipt of a Default Motion.

On that same day, Attorney for Respondent, Todd S. Richardson, submitted an Answer to the Complaint which was received in this office on June 14, 1989. An Order to Show Cause Why Default Should Not Issue, which would have set out Respondent's responsibilities, was not issued.

On June 15, 1989, I received a Memorandum in Opposition to Respondent's Attempt to File a Late Answer. From an equitable viewpoint, the Complainant has not been prejudiced. Therefore, finding the answer to be timely filed, I hereby deny Complainant's Motion for Default.

Accordingly,

- (1). Complainant's Motion for Entry of Default Judgment is denied.
- (2). An Order Directing Prehearing Procedures will be ordered separately.
- (3). A prehearing telephonic conference will be arranged by this office.

IT IS SO ORDERED this 16th day of June, 1989, at San Diego, California.

E. MILTON FROSBURG  
Administrative Law Judge  
Executive Office for Immigration Review  
Office of the Administrative Law Judge  
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